Supreme Court, U. S.
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80-29
No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

CITY OF ST. LOUIS, *et al.*,
Petitioners,

v.

THE UNITED STATES OF AMERICA, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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QUESTIONS PRESENTED

I. Whether Title VII (42 U.S.C. §2000e, et seq.) authorizes a Court of Appeals to mandate, on interlocutory appeal, quota relief against a public employer in the form of a promotion quota, imposed without reference to the racial composition of the appropriate candidate pool and without reference to any valid means of ascertaining whether candidates are minimally qualified.

II. Whether, applying appropriate standards for preliminary injunctions in a Title VII case involving a public employer, a District Court may properly deny such relief on the basis of substantial evidence that the civil service employee selection procedure at issue was professionally developed and validated as job-related, where the job involved directly affects the public safety, notwithstanding contrary evidence on the issue of job-relatedness.

III. Whether a content valid selection procedure used by a public employer to rank candidates for promotion must be supported by "empirical evidence" of correlation between the selection procedure and job performance, above and beyond evidence showing the relationship between the selection procedure and a concededly complete job analysis, in order to permit the procedure's use as job-related under Title VII and the Uniform Guidelines on Employee Selection Procedures.

IV. Whether the "Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures," being an interpretation by anonymous draftsmen of Guidelines which are themselves interpretations of Title VII, are entitled to the same judicial deference as the Guidelines.

PARTIES BELOW

The parties in the Court of Appeals were as follows:

Appellants: United States of America; Firefighters Institute for Racial Equality, a corporation; George Baker, Robert D. Morgan, Robert Grady, Sherman George, George Redford Turner, Lawrence L. Britt, Vernon Ammons, Wendell H. Goins, Charles Gay, George E. Horne, William L. Young, Daniel S. Austin, Robert Anderson, John H. Harvey, Joseph P. Hughes, Eugene Stanton, Preston Sims, each individually and on behalf of all other persons similarly situated.

Appellees: The City of St. Louis, Missouri; Frank C. Cummings, Acting Chairman of the Civil Service Commission of City of St. Louis; Fred Gould, a member of the Civil Service Commission, City of St. Louis; Charles Marino, Director, Department of Public Safety, City of St. Louis; Denis D. Broderick, individually and in his capacity as Fire Chief of the City of St. Louis; R. Elliott Scearce, individually and in his capacity as Director of the Department of Personnel, City of St. Louis.

Intervenors-Appellees: Joseph Blessing, Michael Davis, Robert Crowley, David Banta, Andrew Rios, George Hohmann, Don Blackwell, Nick Altmeyer and George Tschlis, each individually and as members of a class; Roland Ralston and William O. Hill.

The City of St. Louis and its officers named above are, of course, the Petitioners in this Court. Respondents hereinafter will be referred to respectively as the "Government," "FIRE" and "Intervenors".

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Come now Petitioners, and respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on April 9, 1980.

OPINIONS BELOW

The original opinion of the Court of Appeals, January 17, 1980, reversing the order of the District Court denying preliminary relief, is reported unofficially at 21 FEP Cases 1140. The opinion of the Court of Appeals as modified on denial of rehearing on April 9, 1980 is reported at 616 F.2d 350, and this version of the opinion is reproduced in Appendix A hereto, together with the order denying rehearing. The opinion of the District Court, filed June 4, 1979, is reported at 470 F.Supp.

1281, 19 FEP Cases 1643, and is reproduced in Appendix B. For the convenience of this Court, the previous opinions of the Court of Appeals, reported respectively at 588 F.2d 235, cert. denied, 99 S.Ct. 3096 (1979), and 549 F.2d 506, cert. denied, 434 U.S. 819 (1977), are reproduced in Appendices C and D.

JURISDICTION

The judgment of the Court of Appeals was initially entered on January 17, 1980. Timely petitions for rehearing were filed. The petitions for rehearing were denied and the opinion of the Court of Appeals modified on April 9, 1980. This Petition is filed within ninety days of that date. 28 U.S.C. §2101. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS AND "REGULATIONS" INVOLVED

The pertinent provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq., are reproduced in Appendix G hereto. Although they are not in fact regulations, the Uniform Guidelines on Employee Selection Procedures (1978), adopted by the Equal Employment Opportunity Commission (EEOC), 29 CFR Part 1607, are reproduced in pertinent part in Appendix H. Similarly, the "Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures," 44 Fed. Reg. 11996 (March 2, 1979) are reproduced to the extent relevant in Appendix I.

STATEMENT OF THE CASE

Following a judgment of the United States Court of Appeals for the Eighth Circuit finding that the selection procedure for promotion to fire captain in the St. Louis Fire Department did not comport with the standards required by Title VII of the Civil Rights Act of 1964, as amended, the United States District Court for the Eastern District of Missouri (Nangle, District

Judge) entered an order, *inter alia,* requiring Petitioners to develop a new selection procedure which complied with EEOC guidelines. Appendix E. Other aspects of this order induced another appeal, after which the District Court entered an order requiring Petitioners to immediately promote 12 black firefighters, with the option also of promoting 12 whites to the rank of fire captain, and directing Petitioners to develop a valid selection procedure not later than January 1, 1979. Appendix F.

Acting on the orders of the Court of Appeals and the District Court in the summer of 1978, experts employed by Petitioners began to develop and document the new fire captain selection procedure (hereinafter sometimes referred to as the "1979 examination"), utilizing the Uniform Guidelines on Employee Selection Procedures, initially published in December, 1977, 42 Fed. Reg. 66542 and finally adopted in August with an effective date of September 25, 1978. 43 Fed. Reg. 38290 (Aug. 25, 1979); Appendix H. The result of these efforts was a massive (in excess of 700 pages) validity report on the 1979 examination which was filed by Petitioners with the District Court on December 29, 1978. The purpose of the filing with the District Court was to permit the Government and FIRE to critique the 1979 examination in advance of its administration. See Appendix E, p. A-75. However, the Government and FIRE instead proposed, and all parties eventually agreed, that administration of the examination should proceed and objections would be reserved until after an assessment of adverse impact. Appendix A, p. A-5.

The 1979 examination was administered in two segments, a written, multiple-choice examination (30% of total score) and an assessment center (70% of score). Appendix B, p. A-33. The results of the written portion caused the Government to express reservations, but the assessment center was allowed to proceed. Upon publication of the final results, Petitioners acted immediately to promote candidates on the basis of their rank on the 1979 examination. Appendix A, p. A-5. The Government and FIRE obtained a temporary restraining order from the District Court after twenty-four firefighters (1 black) had been promoted. Appendix A, p. A-5—A-6.

The District Court held an extensive hearing on the question of whether to grant a preliminary injunction, generating a transcript of nearly 400 pages and numerous statistical exhibits in addition to the validity report previously filed.[1] Although a portion of the evidence adduced concerned adverse impact of the 1979 examination, by far the largest proportion related to the validity, under Title VII and the Uniform Guidelines on Employee Selection Procedures (1978), of the examination. Nearly all of the testimony given at trial was that of expert witnesses presented by each side.

On June 4, 1979, the District Court denied the application for a preliminary injunction and dissolved the temporary restraining order previously granted. In its opinion, 470 F.Supp. 1281, 19 FEP Cases 1643, Appendix B, the Court stated that the "issue to be decided by this Court at this juncture in the proceedings is whether plaintiffs have established 'a clear showing of probable success *and* possible irreparable injury' based upon plaintiffs' claim that the examination was not properly validated." Appendix B, p. A-33. The District Court assumed, without deciding, that promotions based upon an invalid examination having adverse impact would establish a possibility of irreparable harm. *Id.* Based on statistical evidence, the District Court concluded that there was no adverse ("disparate") impact on the assessment center portion of the 1979

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[1] The appeal below proceeded on a designated record. Rule 30(f), F.R.App.Pro., 8th Cir. Rule 11. Petitioners have previously requested that the Clerk of the Court of Appeals certify the entire record to this Court pursuant to former U.S.Sup.Ct. Rule 21, but Petitioners have been informed that the record will not be certified without the express request of the Clerk of this Court. Consequently, Petitioners have largely confined their Statement of the Case to facts which can be collected from the published opinions in this case, although some references to the record below have been deemed unavoidable. Petitioners respectfully suggest that full consideration of this petition requires that the record below be certified to this Court.

examination. Appendix B, pp. A-33—A-34. However, the Court concluded that the written portion of the test had an adverse impact and that the Government and FIRE had established a prima facie case of adverse impact on the examination as a whole. *Id.*

Reviewing the evidence of examination validity presented at the hearing, the District Court found that (1) content validity was the only feasible approach in this case; (2) the content of the written and assessment center portions of the 1979 examination was determined after development of a thorough job analysis; (3) an expert panel of incumbent fire officers (two white, two black) was used to analyze job tasks and link them to the knowledges, skills and abilities (KSA's) to which they related; (4) the tasks and KSA's were rated and ranked in terms of importance; (5) KSA's suitable for measurement by a written examination were identified by the expert panel and test items were prepared by the panel and Petitioners' test professionals; (6) test items and KSA's were linked and the difficulty of each item was rated in accordance with the difficulty of the position; (7) similar care was taken with respect to the assessment center concerning development of exercises and reliability of raters; (8) the statistical analyses performed by Petitioners supported the reliability of the written test, the assessment center, and the 1979 examination as a whole; (9) the criticisms of the examination presented by Dr. Richard Barrett (the Government's expert) were insufficient to warrant the conclusion that the 1979 examination was not valid; (10) the City acted in good faith to carry out the mandates of the courts and develop a valid examination. Appendix B, pp. A-36—A-38. In light of the record presented to it, the District Court held that the Government and FIRE had failed to establish probable success on the merits, and so denied relief.

On interlocutory appeal, the Court of Appeals for the Eighth Circuit "vacated" the order of the District Court denying a preliminary injunction, and also fashioned extensive affirmative

relief (which had not been requested in the District Court). Based on its own review of the evidence (see, e.g., Appendix A, p. A-19), and its own resolution of conflicting expert testimony, the Court of Appeals concluded that Petitioners had failed to prove that the 1979 examination was content valid. In reaching this conclusion, the Court relied not only upon the Uniform Guidelines but also very heavily upon the "Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures." See Appendix A, p. A-14. In applying the Guidelines and the Questions and Answers, the Court of Appeals accepted nearly every criticism of the 1979 examination advanced by the Government's expert, notwithstanding the trial court's express rejection of that testimony. Compare Appendix A, pp. A-17—A-19 with Appendix B, pp. A-37—A-38.

Having demolished the 1979 examination, the Court of Appeals proceeded to fashion both interim and long-term mandatory relief, in an attempt to finally dispose of the case on the merits. Appendix A, pp. A-25—A-26. As part of its mandatory relief, the Court ordered Petitioners to immediately promote eight black firefighters and to promote additional firefighters in a black/white ratio of 1:2 until all existing vacancies and thirty additional vacancies were filled. Appendix A, p. A-28. The Court noted that full implementation of its promotion quota would raise black representation in the fire captain rank to 26%, nearly equivalent to black representation in the firefighter rank, but the Court made no reference to the racial composition of those who actually took the 1979 examination. Compare Appendix B, p. A-34. The Court of Appeals gave a number of justifications for imposing quota relief on interlocutory appeal, including the "recalcitrance" of the City of St. Louis, although the Court did not question the District Court's express finding that Petitioners (including the City) had acted in good faith to carry out the mandates of the courts and to develop a valid examination. See Appendix A, p. A-27.

Although the Court of Appeals held that the 1979 examination was not valid for any purpose, the Court nevertheless directed Petitioners to make promotions on the basis of the assessment center segment of the examination, using segregated lists for black and white firefighters. Appendix A, p. A-28. The Court of Appeals apparently found *sua sponte* that assurance of minimal qualifications for promotion was obtained by the fact that all assessment center participants had five years' satisfactory service and had passed the written test, although the Court pointed to no evidence in the record to support that view. *Id.*, p. A-27.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

I. The Petition Ought To Be Granted Because The Questions Of Federal Law Presented Herein Are Recurring Questions Of Serious National Importance And Must Be Settled By This Court.

A. The decision of the Court of Appeals, by imposing promotion quota relief on interlocutory appeal wholly without reference to qualifications of candidates or the racial composition of the appropriate candidate pool, and without any evidence as to the necessity or propriety of such relief, represents a novel and extraordinary departure from principles of affirmative relief heretofore obtaining in Title VII cases, and illustrates the compelling need for articulation of more precise standards to govern the imposition of quota relief under Title VII.

This Court has held in other contexts that the use of mathematical ratios as "a starting point in the process of shaping a remedy" for illegal discrimination is not unconstitutional and is "within the equitable remedial discretion of the District Court." *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 25 (1971). However, the Court has to date refrained from providing clear guidance to the lower courts in imposing such remedies in Title VII cases, although it has had at least one opportunity to do so. See *County of Los Angeles* v. *Davis,* 440 U.S. 625, 19 FEP Cases 282 (1979), vacating as moot *Davis* v. *County of Los Angeles,* 566 F.2d 1334, 16 FEP Cases 396 (9th Cir. 1977).[2] Nevertheless, the lower federal courts have proceeded to impose quota relief regularly as a remedy under Title VII,

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[2] The practice of the lower courts in fashioning such race-conscious relief has been recognized by this Court, but has not been expressly approved. See *Regents of University of California* v. *Bakke,* 438 U.S. 265, 301-02, 17 FEP Cases 1000, 1015 (1978) (Powell, J.).

utilizing an almost bewildering variety of ratios and rationales. See, e.g., *United States* v. *City of Chicago,* 549 F.2d 415, 14 FEP Cases 462 (7th Cir.), cert. denied sub nom. *Arado* v. *United States,* 434 U.S. 875 (1977); *Vulcan Society* v. *Civil Service Comm.,* 490 F.2d 387, 6 FEP Cases 1045 (2d Cir. 1973); *Carter* v. *Gallagher,* 452 F.2d 315, 3 FEP Cases 900, modified on rehearing en banc, 452 F.2d 327, 4 FEP Cases 121 (8th Cir.) cert. denied, 406 U.S. 950 (1972); see generally, B. Schlei & P. Grossman, Employment Discrimination Law 1199-1200 (1976), *id.,* Supp. 322 (1979).

One of the questions Petitioners seek to present here is not the constitutionality of quota relief, but rather what "sound legal principles" guide the "judgment" of a federal court which is exercising its discretion to fashion quota relief under Title VII. Cf. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 10 FEP Cases 1181 (1975) (construing §706(g) of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5(g), with respect to standards governing award of back pay). This question is particularly acute when the case involves promotion quotas, which have been imposed much less frequently and much more carefully than hiring quotas, see, e.g., *Sledge* v. *J.P. Stevens & Co.,* 585 F.2d 625, 18 FEP Cases 261 (4th Cir. 1978), cert. denied, 440 U.S. 981 (1979), and which are usually sought in cases involving public employers functioning under civil service systems, so that such relief will typically directly affect identifiable non-minority persons with legitimate expectations of promotion, see, e.g., *Kirkland* v. *New York State Dept. of Correctional Services,* 520 F.2d 420, 11 FEP Cases 38 (2d Cir. 1975), cert. denied, 429 U.S. 823 (1976).

This Court has frequently emphasized the remedial purpose of Title VII, e.g., *Albemarle Paper Co.* v. *Moody,* supra; *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 12 FEP Cases 549 (1976). The Court has also recognized that Title VII does not require employers to utilize employee selection pro-

cedures which maximize minority representation in the work force, *Furnco Construction Corp.* v. *Waters,* 438 U.S. 567, 577-78, 17 FEP Cases 1062, 1066 (1978), and that all relevant statistics pertaining to the availability of minorities must be considered in assessing liability in hiring discrimination cases. *Id;* see also *Hazelwood School Dist.* v. *United States,* 433 U.S. 299, 15 FEP Cases 1 (1977). From these cases the principle follows that remedial employment quotas must be fashioned under Title VII with reference to the relevant pool of candidates or applicants. See, e.g., *EEOC* v. *Local 638, etc.,* 532 F.2d 821, 15 FEP Cases 1618 (2d Cir. 1976); *United States* v. *N.L. Industries, Inc.* 479 F.2d 354, 377, 5 FEP Cases 823, 841 (8th Cir. 1973) ("... in determining an appropriate minority-nonminority hiring ratio, we think that the number of qualified blacks available is an important factor. . . ."); cf. *Ostapowicz* v. *Johnson Bronze Co.,* 541 F.2d 394, 13 FEP Cases 517 (3d Cir. 1976), cert. denied, 429 U.S. 1041 (1977) (sex discrimination case). This requirement would seem to be particularly pertinent when promotion quotas are involved, since the effect of such quotas will be to displace non-minority candidates who may have equal or superior qualifications. Cf. *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Comm.,* 482 F.2d 1333, 5 FEP Cases 1344 (2d Cir. 1973), cert. denied, 421 U.S. 991 (1975).

In fashioning quota relief, especially promotion quotas, some courts have also considered whether there is a "compelling need" for such relief, whether there was "egregious" or intentional discrimination, whether statistical disparities were extreme, and whether the discrimination found could otherwise be cured without a quota. See, e.g., *Sledge* v. *J.P. Stevens & Co.,* supra, 585 F.2d at 646-50, 18 FEP Cases 275-79; *White* v. *Carolina Paperboard Corp.,* 564 F.2d 1073, 16 FEP Cases 44 (4th Cir. 1977); *Harper* v. *Mayor & City Council of Baltimore,* 359 F.Supp. 1187, 5 FEP Cases 1050 (D.Md.), aff'd sub nom. *Harper* v. *Kloster,* 486 F.2d 1134, 6 FEP Cases 880 (4th Cir. 1973); *EEOC* v. *Local 638, etc.,* supra; *Kirkland* v. *New York*

State Dept. of Correctional Services, supra, 520 F.2d at 427, 11 FEP Cases at 43; cf. *Morrow* v. *Crisler,* 491 F.2d 1053, 7 FEP Cases 586 (5th Cir. banc), cert. denied, 410 U.S. 895 (1974). It has also been said that court-imposed quotas must be subjected to a "reasonableness test" to determine whether they provide an effective remedy for past discrimination without unnecessarily trammeling the interests of non-minority candidates for promotion. *Detroit Police Officers' Ass'n* v. *Young,* 608 F.2d 671, 20 FEP Cases 1728 (6th Cir. 1979), pet. for cert. filed, 48 USLW 3558 (1980) (No. 79-1080).

Because promotion quotas have been so sparingly utilized, it seems that no courts have addressed the issue of how one determines qualifications for promotion in the absence of a valid selection procedure. Some *hiring* quota cases have been able to avoid a similar problem by finding selection procedures to be valid on a pass/fail basis but not valid for ranking purposes, e.g., *Louisville Black Police Officers Org.* v. *City of Louisville,* ____ F.Supp. ____, 20 FEP Cases 1195 (W.D.Ky. 1979). Other courts have skirted the problem by simply barring the use of unvalidated, discriminatory selection procedures but giving the employers the option of continuing to utilize them on an essentially segregated basis. *Guardians Ass'n* v. *Civil Service Comm., New York City,* ____ F.Supp. ____, 21 FEP Cases 1467, 1472 (S.D.N.Y. 1980); see also *United States* v. *City of Chicago (Fire Dept.),* 573 F.2d 416, 429 16 FEP Cases 908, 916-17 (7th Cir. 1978) (promotions offered first to minorities on suspect eligibility lists until valid selection procedure implemented).

Finally, most courts have recognized the general principle that, even in Title VII cases, the framing of remedial decrees "'should take place in the District rather than the Appellate Courts,'" *Vulcan Society* v. *Civil Service Comm.,* supra, 490 F.2d at 399, 6 FEP Cases at 1053, quoting *International Salt Co.* v. *United States,* 332 U.S. 392, 400 (1947); see also *Dawson*

v. *Pastrick*, 600 F.2d 70, 19 FEP Cases 1540 (7th Cir. 1979). There are few, if any, reported instances (other than the case at bar) where the severe limitations on the granting of mandatory relief on interlocutory appeal have been ignored. Compare *United States* v. *Spectro Foods Corp.*, 544 F.2d 1175 (3d Cir. 1976) and *Dunn* v. *Retail Clerks, Local 1529*, 299 F.2d 873 (6th Cir. 1962) with *United States* v. *City of Chicago (Fire Dept.)*, supra.

Whether some or all of the foregoing considerations must figure in the decision to impose quota relief can only be decided by this Court. Whatever the standards for such relief are or should be, however, the need for the explication of standards by this Court is cast in sharp relief by the decision of the Court of Appeals in this case. It is not too much to say that in this case, equity varied like the Chancellor's foot. To be sure, the Court of Appeals offered numerous justifications for its draconian decree: immediate promotions to fire captain were required to vitiate morale and efficiency problems in the St. Louis Fire Department flowing from the large number of vacancies in the rank of captain; the possibility that further delays in promotion to captain would disadvantage blacks in competing for promotion to battalion chief; and "we suspect that there has been a certain amount of foot-dragging by St. Louis." Appendix A, p. A-27. But does this approach constitute "the principled application of standards consistent with" the principles of Title VII?[3] Clearly not.

The Court of Appeals in this case ignored the primary role of the District Court in framing relief, ignored the racial composition of the appropriate candidate pool, and ignored the question of how qualifications for promotion could properly be

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[3] See *Albemarle*, supra, 422 U.S. at 417, 10 FEP Cases at 1187.

determined in the absence of a valid selection procedure. Instead, the Court of Appeals substituted its discretion for that of the District Court, imposed a quota that will result in substantial overrepresentation of minorities in the affected job, and created its own means of determining minimal qualifications without a scintilla of evidence that its own chosen method was valid, i.e., demonstrably job-related.

The Court of Appeals' promotion quota effectively disposed of 68 fire captain vacancies, when the record showed that the complement in the rank was 162.[4] In so doing, the Court acted on a request for mandatory relief presented for the first time on interlocutory appeal under 28 U.S.C. §1292(a)(1). The Court noted that full implementation of its quota would result in blacks holding 26% of the fire captain promotions. Appendix A, p. A-27, n.25. The Court made absolutely no reference to the composition of the relevant candidate pool, although it did observe that blacks comprised 22% of all Fire Department personnel and 27% of entry level firefighters. The Court simply ignored the fact that, of those firefighters actually eligible to compete for promotion to fire captain, 15% were black.[5]

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[4] The complement of fire captains is now 148, due to fiscal constraints necessitating a reduction in St. Louis Fire Department manpower.

[5] Understandably, the composition of the appropriate applicant pool does not appear in the opinion of the Court of Appeals. The District Court found, however, that 15% of those who began the 1979 examination were black. Appendix B, p. A-34. The uncontradicted and uncontested evidence in the record shows that five years of service as a firefighter is necessary before one can be considered eligible to compete for promotion to captain. Defendants' Exhibit B (Validation Report), pp. 79 ff. There is no claim that blacks were deterred from taking the examination by past discrimination; in fact, the record shows that proportionately more black firefighters took the test.

Why was a quota resulting in minority representation of 26% in the fire captain rank necessary, when blacks comprised only 15% of the relevant candidate pool? No sound reason was given by the Court of Appeals, although perhaps its fashioning of relief was influenced by the "recalcitrance" or "foot-dragging" of the Petitioners. Yet in this respect the Court of Appeals disregarded two important factors: (1) twelve black firefighters had previously been promoted by order of the Court of Appeals to remedy past discrimination, see Appendix C, p. A-50; and (2) the District Court expressly found that Petitioners had acted in good faith to carry out the mandates of the courts and develop a valid selection procedure. Appendix B, p. A-38. It would seem that the Court of Appeals has some sort of "corruption of blood" theory regarding employers who have in the past been convicted of Title VII violations.

Perhaps most seriously, the affirmative relief fashioned by the Court of Appeals requires Petitioners to promote fire captains from segregated eligibility lists compiled on the basis of the assessment center portion of the selection procedure which the Court had held to be invalid. See Appendix A, p. A-28. To reach this result, the Court found that a field of (minimally qualified?) candidates existed because all persons on the assessment center list had five years of service and had passed the written portion of the examination! It is the height of irony that the written portion of the 1979 examination received the heaviest criticism from the Court of Appeals. One can only infer that the decision of the Court of Appeals was the product of inclination rather than a judgment guided by sound legal principles. Cf. *Albemarle,* supra, 422 U.S. at 416, 10 FEP Cases at 1187.

In short, the Court of Appeals' decision must be viewed as a significant departure from the norms of affirmative relief under Title VII - as well as from the norms of mandatory relief on interlocutory appeal. Because the type of quota relief fashioned by the Court below presents serious and sensitive issues, cf.

Regents of University of California v. *Bakke,* supra, the articulation of controlling standards by this Court is clearly in order. Accordingly, this Petition ought to be granted so that the judgment of the Court of Appeals can be reviewed and corrected by this Court.

B. The decision of the Court of Appeals threatens both the continued utility of content valid selection procedures and the existence and efficacy of traditional civil service merit systems based on competitive examination.

The decision of the Court of Appeals with respect to the selection procedure in this case raises a number of very serious problems. In the first place, it does nothing to clarify the prevailing confusion as to the appropriate standards for granting preliminary injunctions in Title VII cases. Compare Appendix A with *Dendy* v. *Washington Hospital Center,* 581 F.2d 990, 17 FEP Cases 1227 (D.C.Cir. 1978); *Oburn* v. *Shapp,* 521 F.2d 142, 14 FEP Cases 1046 (3d Cir. 1975). Moreover, the review methodology of the Court of Appeals in this case seems to guarantee that a preliminary injunction will issue as a matter of course in Title VII cases involving public employers' selection procedures. Here, Petitioners presented extensive evidence of a professionally developed and validated selection procedure in an effort to refute the Government's and FIRE's showing (if any) of probable success on the merits; but this proved Petitioners' undoing, since the Court of Appeals gave no deference whatever to the District Court's findings and made a frank attempt to dispose of the case on interlocutory appeal. See Appendix A, p. A-25. Yet, if Petitioners had limited their presentation to the mere introduction of the validity report prepared by its experts, there can be no doubt that the Court of Appeals would have held such evidence inadequate to refute probable success on the merits by

the Government and FIRE. Once again, it is a question of standards to be observed by the lower federal courts.[6]

This Court has held that preliminary relief affecting government personnel matters is not to be viewed in quite the same way as other applications for such relief. See *Sampson* v. *Murray*, 415 U.S. 61 (1974); compare *Garza* v. *Texas Educational Foundation, Inc.*, 565 F.2d 909 (5th Cir. 1978) with *United States* v. *Hayes International Corp.*, 415 F.2d 1038, 2 FEP Cases 67 (5th Cir. 1969). The Court of Appeals for the District of Columbia Circuit has recognized that preliminary injunctions affecting employee selection are not to be lightly granted when the employer presents substantial evidence of test validity, and the job is one which directly relates to the public health and safety. *Dendy* v. *Washington Hospital Center*, supra. Accordingly, it would seem that certiorari would be appropriate in this case in order to provide authoritative guidance to the lower federal courts and to prevent unnecessary disruption of the operations of public employers in similar cases.

Viewed as a substantive decision on the merits of Petitioners' claim that the 1979 examination for fire captain was job-related, the opinion of the Court of Appeals raises even more serious questions.

The 1979 examination for fire captain was developed as a content valid selection procedure - the only feasible method. See Appendix B, p. A-35; see also Appendix D, p. A-62. Content validity essentially is found when the content of the test matches the content of the job. E.g., *Vulcan Society* v. *Civil Service Comm.*, supra, 490 F.2d 395, 6 FEP Cases 1050. Stated

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[6] The Court of Appeals professed to review the District Court in terms of the "traditional" preliminary injunction standard (movant must show irreparable harm *and* substantial probability of success on the merits, see *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922 (1975)), but the opinion of the Court belies this at every step.

less simply, content validity is established by showing that the test is representative of and actually measures work behaviors necessary for successful job performance or that the test measures knowledges, skills and abilities used in and necessary for performance of important work behaviors. Uniform Guidelines on Employee Selection Procedures, 29 CFR §1607.14 (C) (4), Appendix H, p. A-133; see Comment, The Uniform Guidelines on Employee Selection Procedures; Compromises and Controversies, 28 Cath.L.Rev. 605, 622-23 (1979). Only after a long struggle in the courts and in the bureaucracy was content validity recognized in the Uniform Guidelines as the psychometric coequal of criterion-related validity, the darling of the original EEOC Guidelines. See *Washington* v. *Davis,* 426 U.S. 229, 247 n. 13, 12 FEP Cases 1415, 1422 n. 13 (1976); *Blake* v. *City of Los Angeles,* 595 F.2d 1367, 19 FEP Cases 1441 (9th Cir. 1979), cert. denied, 48 USLW 3698 (1980); see generally, Seelman, Employment Testing Law: The Federal Agencies Go Public with the Problems, 10 Urb.Law. 1 (1978); Comment, supra, 28 Cath.L.Rev. 620-21; Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv.L.Rev. 1109, 1122-28 (1971).

In the case at bar, the Court of Appeals rejected the content validity of the 1979 examination for fire captain for two major reasons: (1) "Nothing in the record can be construed as empirical evidence of an association between levels of performance on the . . . examination and on the job," Appendix A, pp. A-15, A-20; and (2) "the circumstances of a multiple-choice examination are so dissimilar from the work situation as to make it impossible to establish job relatedness through a content validity study," id., p. A-21, n. 19. In reaching these conclusions, the Court of Appeals relied less on the Uniform Guidelines than on the explanatory Questions and Answers (discussed below), but the critical factors in the decision were obviously the use of written exercises as part of a selection procedure for a "physical doing, hands-on job," and the absense

of some (unspecified) direct, concrete evidence that good performance on the 1979 examination presaged good performance as a fire captain. Clearly, this view of the requisites of content validity grievously misconstrues the theory underlying that strategy and, if uncorrected by this Court, will restrict the use of content validity to the most elementary types of selection procedures (e.g., typing tests for typists).

The reasoning of the Court of Appeals concerning content validity is seriously deficient in several respects. First, as even the Questions and Answers recognize, content validity is primarily a judgmental process concerned with the adequacy of the selection procedure as a sample of work behaviors or necessary job knowledge. Question and Answer No. 62, Appendix I, p. A-176; see also L. Cronbach, Essentials of Psychological Testing 148 (1970). Content validity depends primarily on the adequacy of the job analysis in identifying critical work behaviors and knowledges, skills and abilities necessarily prerequisite to successful job performance. Uniform Guidelines, §1607.14(C)(1) and (2), Appendix H, p. A-131. The content valid procedure is not and cannot be a pure predictive procedure, see Developments in the Law, supra, 84 Harv.L.Rev. 1122, and nothing in the Guidelines or in any accepted professional standards provides that content validity is destroyed unless there is "empirical evidence" *outside the job analysis* that good test performance does indeed predict good job performance. On the contrary, in most cases, claims of content validity have foundered when the job analysis is held to be faulty or when the examination is found to be unrelated to the job analysis. See, e.g., *United States* v. *City of Chicago (Fire Dept.)*, supra; *Vanguard Justice Society, Inc.* v. *Hughes*, 471 F.Supp. 670, 19 FEP Cases 587 (D.Md. 1979).

In this case, the job analysis is unquestioned. See Appendix A, p. A-14, n. 13. Pursuant to this analysis, knowledges, skills and abilities were identified and rated in terms of importance by an expert panel as well as a cross-section of other fire depart-

ment personnel. See Appendix A, p. A-16; Appendix B, p. A-36; Defendants' Exhibit B (Validation Report) pp. 21-16, 40-60. As the District Court's findings indicate, Petitioners made a more than reasonable showing that the validity report was executed in a responsible, professional manner designed to produce trustworthy results. Since the quality of test preparation and validation was very high under professional standards, as evidenced by the production of an uncontested job analysis, it follows that the likelihood of validity—without any other "empirical evidence"—is correspondingly high. See *United States* v. *South Carolina,* 445 F. Supp. 1094, 15 FEP Cases 1196 (D.S.C. 1977), aff'd sub nom. *National Education Ass'n* v. *South Carolina,* 434 U.S. 1026, 16 FEP Cases 507 (1978); *Jones* v. *New York City Human Resources Admin.,* 391 F. Supp. 1064, 12 FEP Cases 264 (S.D.N.Y. 1975), aff'd, 528 F.2d 696, 12 FEP Cases 284 (2d Cir. 1976).

The Court of Appeals also seriously erred in its manifest hostility to the use of any type of written exercise as part of the selection procedure for a non-academic job. Nothing in the Guidelines or reported cases supports such a *per se* rule. Indeed, the Guidelines were themselves revised in conformity to professional criticism that the standards for content validity, as originally proposed, placed "the emphasis . . . on observable work behavior or work product and [neglected] situations where knowledge, skill or ability is essential to an outcome which is not necessarily a replication of the test." Compare BNA Daily Labor Report, No. 67, April 6, 1978, at A-22 with 43 Fed. Reg. 38295, Appendix G, p. A-106. If certain knowledges are identified by an adequate job analysis as necessary to performance, then it would seem permissible to test for such knowledges through any reasonable medium, not excluding a multiple-choice test, so long as no irrelevant difficulty is introduced. See, e.g., *Jackson* v. *Nassau County Civil Service Comm.,* 424 F. Supp. 1162, 14 FEP Cases 775 (E.D.N.Y. 1976); see also, Question and Answer No. 73; Appendix I, p. A-179.

If the decision of this Court of Appeals in this case remains undisturbed, it is readily apparent that the effect on public employees will be disastrous. The written competitive examination will be virtually outlawed, as will the traditional rank-ordering of candidates on civil service employment registers, even if done by means of assessment centers. Moreover, the use of content validity will be foreclosed as an effective validation strategy.

In sum, the need for clarification of the standard for issuance of preliminary injunctions in Title VII cases affecting public employers is plain. Judicial interference in public personnel matters is not to be embarked upon lightly. Compare *Sampson* v. *Murray,* supra, with *Bishop* v. *Wood,* 426 U.S. 341 (1976). "Civil service laws, like civil rights laws, were enacted to ameliorate a social evil," and "the judiciary should act with great reluctance in undermining traditional civil service concepts." *Kirkland,* supra, 520 F.2d 428, 11 FEP Cases 44; see also *Commonwealth of Pennsylvania* v. *O'Neill,* 465 F.Supp. 451, 464-65, 19 FEP Cases 55, 66 (E.D.Pa. 1979). Where, as here, the evidence clearly shows that the employer developed a selection procedure in a professional manner, designed to produce trustworthy results, in light of a thorough analysis of the particular job, with the assistance of minority employees, surely the District Court may properly deny preliminary relief, especially where the job in question directly affects the public safety. Cf. *Dendy* v. *Washington Hospital Center,* supra; see also *Washington* v. *Walker,* 529 F.2d 1062, 12 FEP Cases 1075 (7th Cir. 1976); *McCullers* v. *City of Raleigh,* 11 FEP Cases 1034 (E.D.N.C. 1975).

In a larger sense, it is also time to clarify the weight and nature of the burden imposed upon employers seeking to give

and act upon the results of professionally developed ability tests, see 42 U.S.C. §2000e-2(h)—a burden which, judging by the reported cases, has seldom been successfully carried by employers. "Courts must recognize that the art of psychological testing is imprecise." Johnson, Albemarle Paper Company v. Moody: The Aftermath of Griggs and the Death of Employee Testing, 27 Hast.L.J. 1239, 1261 (1976). Of late, it would appear that the private employer has largely abandoned the struggle. Cf. Seelman, supra, 10 Urb.Law. at 71 n. 331. Public employers, bound by civil service laws, have an obligation to strive to preserve the merit system so laboriously constructed in this nation since 1883, and there does not appear to be any sound alternative to the competitive examination. But even public employers will soon be forced, by decisions such as that of the Court of Appeals in this case, to foresake the principle that "selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures all receive equal opportunity." Civil Service Reform Act of 1978, 92 Stat. 1113, 5 U.S.C. §2301(b)(1).

In *Albemarle,* supra, Mr. Justice Blackmun wrote of his fear that "a too rigid application of the EEOC Guidelines will leave the employer little choice, save an impossibly expensive and complex validation study, but to engage in a subjective quota system of employment selection." 422 U.S. at 449, 10 FEP Cases at 1197 (concurring opinion). With the decision of the Court of Appeals in this case, this prophecy has come to pass. Indeed, so rigorous has the burden on the employer become that not even exceedingly expensive and complex validation studies suffice. The employer is left with no choice but to engage in race-based employment selection; and, with consummate hypocrisy, the Government's own expert witnesses have advocated

precisely that![7] If this revisionist philosophy of "separate but equal" is to be repudiated, certiorari should issue so that this Court can review and reverse the judgment below.

C. The Court of Appeals accorded unwarranted and excessive deference to the "Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures."

This Court has held that the EEOC Guidelines on employee selection procedures, being the administrative interpretation of Title VII by the enforcing agency, are entitled to great deference in the courts. E.g., *Albemarle Paper Co.* v. *Moody,* supra. While the process which led to the promulgation of the Uniform Guidelines by the EEOC and other agencies smacks more of bureaucratic legislation than of interpretation, see Seelman, supra, 10 Urb. Law. 3 ff.; Comment, supra, 28 Cath. L. Rev. 608-10; BNA Daily Labor Report, No. 252, December 30, 1977, at A-7, Petitioners do not here question that the Guidelines themselves provide the general standard of validity for the 1979 examination.[8]

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[7] "While conceding the difficulty of constructing a test for police officers that could be validated as having job relatedness, they both [Dr. Richard Barrett and Dr. James Fitzpatrick] testified that if tests such as this were used, the adverse impact on minorities should be eased by maintaining separate lists for blacks, hispanics, and whites, and selecting from these *separate lists* in a way would insure equal opportunity to the minorities." *Guardians Ass'n* v. *Civil Service Comm., New York City,* supra, 21 FEP Cases 1467, 1472 (emphasis added).

[8] In fact, Petitioners were under a mandate to follow the Guidelines in developing the 1979 examination. See Appendix D, pp. A-66—A-67; Appendix E. But see *United States* v. *South Carolina,* supra, 445 F. Supp. at 1113 n. 20, 15 FEP Cases at 1214 n. 20.

Petitioners do question, however, the heavy reliance of the Court of Appeals on the "Questions and Answers to Clarify and Promote a Common Interpretation of the Uniform Guidelines," 44 Fed. Reg. 11996 (March 2, 1979); Appendix I. Many of these Questions and Answers apparently originated with the expert witness who testified for the Government in this case, an individual notorious for the ease and uniformity of his criticism of employment tests, Appendix B, p. A-38. See Barrett, EEOC Guidelines: Accurate Interpretation a Must, 7 Assessment & Development 1 (Feb., 1980). Surely it is inappropriate to judicially validate one man's (or one group's) employment testing theories simply because they are published by a federal agency in the form of questions and answers.

Another problem lies in the likelihood that the Questions and Answers will change, but the Guidelines will remain the same. The Introduction to the Questions and Answers invites "users and other interested persons" to submit additional questions. 44 Fed. Reg. 11996; Appendix I, p. A-151. Yet the purpose of the Questions and Answers is professedly not to modify the Guidelines. Leaving aside for the moment the significant issue of whether the current Questions and Answers do modify the Guidelines,[9] it is apparent that routine judicial deference to the Questions and Answers will ultimately be incompatible with their purpose of promoting clarification and common interpretation of the Guidelines, without actually modifying them. Surely the administrative interpretation of administrative interpretations of Title VII have somewhat less eclat that the Court of Appeals would lead one to believe; otherwise the gloss will soon swallow the text.

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[9]It is fairly obvious that the Questions and Answers relied on by the Court of Appeals, Appendix A, pp. A-15, A-20, seriously undercut the testing of job knowledge in content valid examinations - which the Guidelines recognized only by reason of a revision which was grudgingly acceded to by the agencies in face of heavy criticism by Division 14 of the American Psychological Association. See Daily Labor Report No. 67, supra, at A-22.

It should be recollected that test validity cases are in substance very similar to those involving technical medical, engineering or economic issues, presenting factual questions which should be resolved without validation of particular theories by judicial decree. Note, Employment Testing and Proof of Job-Relatedness: A Tale of Unreasonable Constraints, 52 Notre D. Law. 95 (1976); see also Hunt, Civil Service Testing and Affirmative Action: A Psychologist's Perspective, 44 U. Cin. L. Rev. 690, 695-97 (1975); Rule 702, et seq., F.R.Ev. If employers must cope with a steady stream of "Questions and Answers"[10] as well as with the Guidelines, there is a danger that these bureaucratic pronouncements together will form a procrustean bed on which advanced and novel employment testing techniques will likely be torn to pieces — as was the assessment center in this case, which had previously been hailed by the Court of Appeals as an acceptable technique. Appendix D, p. A-67. Such a development can be forestalled only by review and rejection of the thoughtlessly deferential approach of the Court of Appeals to the Questions and Answers in this case.

II. The Petition Ought To Be Granted Because The Decision Of The Court Of Appeals Conflicts With Decisions Of Other Circuits And Of The Supreme Court.

A. The manner in which affirmative relief was granted in this case is at variance with standards articulated by the Second, Third and Fourth Circuits.

By imposing a 33-1/3% promotion quota to achieve 26% minority representation in the rank of fire captain, without

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[10]It should be noted that the questions and Answers at issue here were not published in final form until after the examination in this case had been developed and partially administered. Moreover, the EEOC appears to have embraced the "Question and Answer" motif in other contexts, so that the status of this technique should be judicially determined as soon as possible. See 29 CRF §1604.10 (Appendix) (EEOC Guidelines on Sex Discrimination).

reference to the racial composition of the appropriate applicant pool, the Court of Appeals has plainly ignored the clear weight of authority in other Circuits. For example, in *Association against Discrimination, etc.* v. *City of Bridgeport,* 594 F.2d 306, 19 FEP Cases 115 (2d Cir. 1979), the Court of Appeals for the Second Circuit vacated the imposition of a 1:1 hiring quota and remanded for express findings as to why the quota "required the hiring of minorities and non-minorities in approximately a 1:1 ratio when minorities constituted only roughly 11 percent of those who took the test." 594 F.2d 311, 19 FEP Cases 119. In *Ostapowicz* v. *Johnson Bronze Co.,* supra, the Third Circuit observed, "Quotas are an extreme form of relief and, while this court has declined to disapprove their use in narrow and carefully limited situations . . ., certainly that remedy has not been greeted with enthusiasm." 541 F.2d 402, 13 FEP Cases 523, citing *Pennsylvania* v. *O'Neill,* 473 F.2d 1029, 5 FEP Cases 713 (3d Cir. 1973) (promotion quota reversed). With that, the Court in *Ostapowicz* vacated an order imposing a hiring quota without findings concerning the composition of the available work force.[11] 541 F.2d at 402, 13 FEP Cases at 523.

The need to identify and consider the appropriate applicant pool is all the more crucial in regard to promotion quotas in the civil service context, for, as the Second Circuit has astutely observed, *Kirkland* v. *New York State Dept. of Correctional Services,* supra, 520 F.2d 429, 11 FEP Cases at 45:

> A hiring quota deals with the public at large, none of whose members can be identified individually in advance. A quota placed upon a small number of readily identifiable candidates for promotion is an entirely different matter. Both these men and the court know in advance that

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[11]Admittedly, *Ostapowicz* was a sex discrimination case, but the citation of *Pennsylvania* v. *O'Neill,* supra, an otherwise cryptic decision, indicates that similar reasoning would be applicable to a race discrimination case in the Third Circuit.

> regardless of their qualifications and standing in a competitive examination, some of them may be by-passed for advancement solely because they are white . . .[12]

Influenced by these considerations, the Second Circuit reversed imposition of a promotion quota, albeit the case was not brought under Title VII.

The decision in this case also sharply conflicts with the approach to quota relief taken by the Fourth Circuit. In *Sledge* v. *J.P. Stevens & Co.*, supra, 585 F.2d at 646, 18 FEP Cases at 275, the Court held that, "assuming quotas are permissible elements of remedial decrees in employment discrimination cases, they are appropriate only under limited and compelling circumstances." The Court then proceeded to vacate the imposition of hiring and promotion quotas in view of the fact that alternative remedies were available and the employer was working diligently to eradicate discrimination. Id., 647-650, 18 FEP Cases 276-79.

In light of the foregoing, it is evident that the opinion of the Court of Appeals respecting relief in this case is not only a departure from settled principles of law under Title VII but also directly conflicts with decisions of the Court of Appeals for the Second, Third and Fourth Circuits. See generally, *Sledge* v. *J.P.*

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[12]Ironically, in the aftermath of the decision of the Court of Appeals in the case at bar, white firefighters have begun to invoke Title VII, claiming that Petitioners have discriminated against them by promoting black firefighters over them in accordance with the Court's order. EEOC (St. Louis) Charge No. 072801070 (Joseph Durham, 5/28/80); Charge No. 072801071 (John Welch, 5/27/80). While these charges are frivolous on their face and should not have been accepted for filing by the EEOC, they do illustrate the harsh impact of the quota and likelihood of exacerbation of racial tensions. See *Kirkland*, supra, 520 F.2d 429, 11 FEP Cases 45, quoting *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Comm., supra*, 482 F.2d at 1341, 5 FEP Cases at 1350.

Stevens & Co., supra.[13] This conflict should be resolved by this Court by reviewing and reversing the Court of Appeals in this case.

B. The Court of Appeals' decision on the issue of test validity in this case conflicts with decisions of the District of Columbia Circuit and of this Court.

Whether the decision of the Court of Appeals in this case is viewed as deciding only an interlocutory appeal from denial of a preliminary injunction (which it was), 28 U.S.C. §1292(a)(1), or as a final decision on the merits (which it frankly tried to be, see Appendix A, p. A-25), the correctness of the Court's judgment must in the final analysis rest on the propriety of the approach it took with respect to assessing the validity of the 1979 examination. Viewed in its proper context as an interlocutory appeal, the case turned on the showing by the Government and FIRE of substantial probability of success on the merits, as well as other factors. The Court of Appeals, by substituting its view of the conflicting expert testimony for that of the District Court, was able to hold that the Government and FIRE had shown probable success on the merits because Petitioners failed to demonstrate validity of the 1979 examination. See Appendix A, p. A-19. However, in *Dendy* v. *Washington Hospital Center,* supra, 581 F.2d at 992, 17 FEP Cases at 1229, a case quite similar to this, the Court of Appeals for the D.C. Circuit discussed the issue of grant or denial of a preliminary injunction as follows:

> The court must consider: (1) the likelihood that plaintiffs will prevail on the merits; (2) the prospect of irreparable injury to plaintiffs if relief is withheld; (3) the possibility of

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[13]The instant case also appears to be inconsistent with other decisions within the Eighth Circuit itself. See *Carter* v. *Gallagher,* supra, 452 F.2d 330-31, 4 FEP Cases 124-25; see also *United States* v. *N.L. Industries, Inc.*, supra.

> harm to other interested parties . . . if preliminary relief is granted; and (4) the public interest. Plaintiffs have the burden of establishing a substantial case on the merits. The merits of the case at bar will, of course, turn on whether plaintiffs can show discriminatory impact, and on whether defendants, in turn, can rebut this showing by demonstrating job-relatedness. . . . The burden of demonstrating job-relatedness is on defendants in a proceeding to decide the merits. However, on a motion for relief pending litigation, the court may take into account the possibility that defendant will be able to establish job-relatedness without a determination that it has shown a positive likelihood of doing so. Even as to issues where the burden at trial is on defendant, when the court is of the view that the motion for relief pending litigation (and the attendant change in the status quo ante) threatens harm to defendant, and the defendant has come forward with some evidence tending to support a defense, the court may take into account whether there is a substantial case for the defense without requiring defendant to establish a mathematical probability of success on the merits.

It is apparent that the Court of Appeals in the case at bar placed a much heavier burden on Petitioners than was warranted by the procedural context of the appeal, and a much heavier burden that the *Dendy* court would require. Since *Dendy* and this case represent singularly conflicting views of preliminary relief in Title VII cases, certiorari should issue to resolve the matter.

Perhaps more importantly, the opinion of the Court of Appeals in this case - viewed as a decision on the merits - takes an approach to validity of the 1979 examination which brings the Eighth Circuit into direct conflict with a decision of this Court.

In *United States* v. *South Carolina,* 445 F.Supp. 1094, 15 FEP Cases 1196 (D.S.C. 1977), aff'd sub nom. *National Educa-*

tion Ass'n v. *South Carolina,* 434 U.S. 1026, 16 FEP Cases 501 (1978), this Court summarily affirmed a decision of a three-judge court rejecting, *inter alia,* a Title VII attack on the validity of the National Teacher Examination, which excluded a disproportionate number of blacks from teaching jobs in the state and also affected pay scales, unfavorably for blacks. The court found that the NTE had been proved to be content valid, and this Court necessarily affirmed that conclusion on appeal. See 46 USLW 3312 (1977); cf. *United States* v. *Board of Education, Garfield Hts.,* 581 F.2d 791 (6th Cir. 1978). A major part of the validity study used in that case involved "content review panels" and "minimum score panels" composed of experienced teacher educators. These "expert panels" determined both the content of the examination for use in South Carolina and the minimum scores required for successful completion. See 445 F.Supp. 1112-13, 15 FEP Cases 1213-15.

Even the most superficial reading of the opinion of the Court of Appeals reveals that the method employed by Petitioners in constructing the 1979 examination closely parallels the method used by South Carolina.[14] See Appendix B, pp. A-36—A-38; see also Appendix A, pp. A-16—A-18. Petitioners' experts utilized not only an expert panel of two white and two black fire officers, but also extensively surveyed a cross-section of all ranks in the St. Louis Fire Department to ensure that the 1979 examination matched the content of the fire captain's job. The criticisms leveled by the Court of Appeals at the efficacy of this method are virtually identical to the criticisms rejected by the Court in *United States* v. *South Carolina,* supra. Compare 445 F.Supp. 1112-13, 15 FEP Cases 1214-15 with Appendix A, pp. A-16—A-18. It is essential to continued utility of content valid

examinations that the conflict between this case and *United States* v. *South Carolina* be resolved by granting this Petition and reversing the judgment below.

CONCLUSION

For the foregoing reasons, certiorari should issue to the Court of Appeals for the Eighth Circuit so that this Honorable Court may review and correct the decision below.

Respectfully submitted,

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[14]It should also be noted that the examination held valid in *United States* v. *South Carolina*, supra, was confined exclusively to tests of *knowledge* and did not purport to measure teaching skills. 445 F.Supp. 1108, 15 FEP Cases 1209.